

HUM PENG SIN

a

v.

LIM LAI HOON & ANOR

COURT OF APPEAL, KUALA LUMPUR

b

GOPAL SRI RAM JCA

SITI NORMA YAAKOB JCA

DENIS ONG JCA

[CIVIL APPEAL NO: P-04-9-1996]

12 JULY 2001

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CIVIL LAW ACT: *Damages - Claim for loss of services of spouse - Whether prohibited by prov. (iii) to s. 7(3) Civil Law Act 1956 - Whether proviso does not apply where replacement for services can be secured at a cost - Whether husband's claim for cost of engaging a housekeeper should be allowed*

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DAMAGES: *Fatal accident - Loss of services of spouse - Whether prohibited by prov. (iii) to s. 7(3) Civil Law Act 1956 - Whether proviso does not apply where replacement for services can be secured at a cost - Whether claim for cost of engaging a housekeeper should be allowed*

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The plaintiff brought an action against the defendants for negligently causing the death of his wife ('the deceased') as a result of a motor accident. The deceased was a factory worker and earned RM600 per month. The Sessions Court refused to make an award for the plaintiff's claim for the loss of her services in respect of engaging a housekeeper to look after their children. Instead, the Sessions Court awarded RM240 per month as loss of dependency despite it being proved that the deceased gave the plaintiff RM450 per month and that her only real expense was a sum of RM90 per month that she paid by way of instalments for a motor cycle. The High Court upheld the awards. Hence, this appeal by the plaintiff.

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Held:

Per Gopal Sri Ram JCA

[1] Proviso (iii) to s. 7(3) of the Civil Law Act 1956 ('the Act') Act prohibits an award for the loss of consortium or services that is the sole head of claim. It does not prohibit an award for the loss of services provided by a wife when such a claim is coupled with another head of claim for engaging a housekeeper. Neither does it apply where it is proved that such a housekeeper has to be engaged but was not because the husband could not afford it due to his impecuniosity.

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- a* Further, the word ‘only’ in the third proviso clearly provides that it does not extend to a claim by a husband for damages for the loss of his wife’s services where a replacement for those services is actually secured at a cost.
- b* [2] The award of the Sessions Court refusing an award for loss of services was set aside and a sum of RM23,000 was awarded under that head of damages. The multiplicand applied by the Sessions Court was set aside and substituted with a multiplicand of RM400. The multiplier was as specified by the Act.
- c* [Orders of the Sessions Court and the High Court set aside and substituted with the orders made herein.]

[Bahasa Malaysia Translation Of Headnotes]

- d* Plaintiff membawa tindakan ini terhadap defendan kerana menyebabkan kematian isterinya (‘si mati’) akibat daripada suatu kemalangan kenderaan. Si mati merupakan seorang pekerja kilang dan mendapat gaji sebanyak RM600 sebulan. Mahkamah Sesyen enggan memberi suatu “award” terhadap tuntutan plaintiff untuk kehilangan perkhidmatannya supaya mengupah seorang pembantu rumah untuk menjaga anak-anaknya.
- e* Sebaliknya Mahkamah Sesyen mengaward RM240 sebulan sebagai kehilangan pergantungan meskipun ianya dibuktikan bahawa si mati memberi plaintiff RM450 sebulan dan perbelanjaannya hanya sebanyak RM90 sebulan sahaja bagi bayaran ansuran untuk sebuah motosikal. Mahkamah Tinggi mengesahkan “award” tersebut. Akibatnya, rayuan ini oleh plaintiff.
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Diputuskan:

Oleh Gopal Sri Ram HMR

- g* [1] Proviso (iii) kepada s. 73 Akta Undang-Undang Sivil 1956 (‘Akta tersebut’) tidak membenarkan “award” untuk kehilangan konsortium atau perkhidmatan yang merupakan tajuk tuntutan yang satu-satunya. Ia tidak melarang “award” untuk kehilangan perkhidmatan yang diberikan oleh isteri di mana tuntutan tersebut termasuk tuntutan mengupahkan seorang pembantu rumah. Ianya tidak juga boleh digunakan di mana dibuktikan bahawa pembantu rumah tersebut harus diupahkan akan tetapi tidak dapat diupahkan oleh kerana suami tidak berupaya membuat demikian disebabkan kemiskinan. Lagipun, perkataan “hanya” dalam proviso tiga jelas memperuntukkan bahawa
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ia tidak termasuk tuntutan suami untuk ganti rugi kehilangan perkhidmatan isteri di mana perkhidmatan tersebut sebenarnya digantikan dengan kos.

[2] “Award” Mahkamah Sesyen supaya melarang “award” untuk kehilangan perkhidmatan diketepikan dan wang sebanyak RM23,000 diberikan untuk ganti rugi tersebut. “Multiplicand” yang digunakan oleh Mahkamah Sesyen diketepikan dan digantikan dengan “multiplicand” bernilai RM400. “Multiplier” adalah sepertimana diperuntukkan oleh Akta tersebut.

[Perintah-perintah oleh Mahkamah Sesyen dan Mahkamah Tinggi diketepikan dan digantikan dengan perintah-perintah mahkamah ini.]

Case(s) referred to:

Alcoa Minerals of Jamaica Inc v. Broderick [2000] 3 WLR 23 (**refd**)

Liesbosch Dredger v. SS Edison [1933] AC 449 (**refd**)

Neo Kim Soon v. Subramaniam [1996] 1 CLJ 730 (**foll**)

Legislation referred to:

Civil Law Act 1956, s. 7(3)

For the plaintiff/appellant - Baldev Singh Bhar (DP Rajah); M/s DP Rajah & Co

For the defendants/respondents - VK Desaratharaj; M/s VP Nathan & Partners

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

This case raises an issue of some importance. It has to do with the admission of a head of damages for personal injuries that constantly comes before the subordinate courts. It all turns on the construction of the third proviso to s. 7(3) of the Civil Law Act 1956 (“the Act”). The factual matrix against which the question at issue has arisen is not in dispute.

On 16 October 1989 the deceased died as a result of a motor accident. She was 40 years old at the date of the accident. She left behind her husband, the plaintiff, and her two children aged 10 and 13. The deceased worked in a factory and earned RM600 per month. She also provided valuable services at home. She cooked, washed clothes and kept house.

- a* The husband brought an action against the defendant for negligently causing the deceased's death. Evidence was led at the trial to prove that a housekeeper had been engaged for a period of two years at a sum of RM280 per month. The husband however claimed RM400 per month as the cost of engaging a housekeeper to look after the children on the ground
- b* that the cost of living had increased. He alleged that this was the sum demanded by maids at the material time and that he was not in a financial position to pay this sum. The Sessions Court however refused to make an award for the loss of the wife's services. Additionally, the Sessions Court awarded only RM240 per month as the loss of dependency despite it having
- c* been proved that the deceased gave her husband RM450 per month and that her only real expense was a sum of RM90 per month that she paid by way of instalments for a motor cycle. Both these awards were upheld by the learned intermediate appellate judge.

- d* Before us, the findings on both awards were attacked. Two issues were raised. The first was whether the plaintiff could recover for the loss of the deceased's services. The second has to do with the quantum of damages that are to be awarded under both heads of claim if the first issue is resolved in the plaintiff's favour.

- e* Let me take the first issue. Now at common law, a husband could recover damages, *inter alia*, for the loss of the services provided by his wife. But an amendment to s. 7 of the Act changed all that. This is what the material portion of the section says:

- f* The damages which the party who shall be liable under sub-section (1) to pay to the party for whom and for whose benefit the action is brought shall, subject to this section, be such as will compensate the party for whom and for whose benefit the action is brought for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default of the party liable under sub-section (1):

- g* Provided that:

- (iii) no damages shall be awarded to a parent on the ground only of his having been deprived of the services of a child; and no damages shall be awarded to a husband on the ground only of his having been deprived of the services or society of his wife;

- h* The section and its third proviso were considered by this court in *Neo Kim Soon v. Subramaniam* [1996] 1 CLJ 730 in almost similar circumstances. That was a case in which the wife was killed in an accident. After her death her husband engaged a servant to look after the child of the marriage. When she was alive the wife had looked after the child. The Sessions Court

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allowed the husband's claim for the servant's wages. The High Court reversed. On further appeal, this court restored the judgment of the Sessions Court. Mahadev Shankar J who delivered the judgment of this court said:

We agree with Mr Chok Chin You of counsel for the plaintiff/appellant that what has been done away with by the proviso (iii) is an award of damages, in this case to the deceased's husband, only on the ground that he has been deprived of the services or society of his wife. So far as a surviving husband is concerned, the proviso has abolished any award by way of general damages for loss of consortium. In other words, proof of the death of a wife, without more, will not entitle the surviving husband to an award in damages.

It is a different matter altogether where a husband has not only lost his wife, but has also been put to monetary loss which has been the direct result of the negligence. Such loss in our view continues to be recoverable.

I am entirely in agreement with this view. In my judgment, what proviso (iii) to s. 7(3) of the Act prohibits is an award for the loss of consortium or services where that is the sole head of claim. In my judgment the third proviso does not prohibit an award for the loss of the services provided by a wife when such a claim is coupled with another head of claim for either actually engaging a housekeeper, as was the case in *Neo Kim Soon v. Subramaniam* (*ibid*). Neither does it apply here where it is proved that such a housekeeper has to be engaged but was not because the plaintiff husband could not afford it due to his impecuniosity. The decision of the Privy Council in *Alcoa Minerals of Jamaica Inc. v. Broderick* [2000] 3 WLR 23 makes it amply clear that the rule in *Liesbosch Dredger v. SS Edison* [1933] AC 449 that the impecuniosity of a plaintiff may break the chain of causation is not an inflexible one. To quote Lord Slynn of Hadley who delivered the decision of the Board in *Alcoa* (*supra*) at p. 30:

The decision in *The Liesbosch* has thus obviously been much discussed but it is not necessary for their Lordships in the present case to consider whether as a part of the law of Jamaica what is said by Lord Wright should be rejected as in the alternative they were invited to do. It seems generally to be accepted that there is no absolute rule that where the plaintiff at the date of breach did not have the funds to repair the damage that his impecuniosity is to be ignored in all cases when deciding the appropriate date for the assessment of damages.

And in a later passage his Lordship states what I think is the true principle:

It seems to their Lordships that this case is clearly to be distinguished from the position in *The Liesbosch* where the cost of hiring was categorised as a separate head of damage from the cost of replacing the dredger, the cost of hiring being due to a separate cause namely the plaintiff's impecuniosity.

- a* In the present case there is only one head of damage namely the cost of repairing the building. The increase in that cost was due to rapid inflation and the fall in the value of the Jamaican dollar. There are not here two heads of damage, one of which must be separated from the other and attributed to the plaintiff's lack of funds. The need to repair the roof was a direct consequence of the tort and the real question is whether Mr. Broderick was in breach of his duty to mitigate his damage.
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- To emphasise, it is clear that the word "only" in the third proviso does not extend it to a claim by a husband for damages for the loss of his wife's services where a replacement for those services is actually secured at a cost as in *Neo Kim Soon v. Subramaniam (ibid)* or where there is a claim for potential loss as in the present instance. It follows from what I have said thus far that an award under this head ought to have been made in the plaintiff's favour.
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- The next issue has to do with the assessment of quantum. This is a fairly straightforward question. For the cost of hiring a maid to replace the services rendered by the deceased, I think that a multiplier of ten is just. I derive this by subtracting 40 (the age of the deceased at the date of her death) from 55 (the age at which she would have retired), multiplying the difference by two and dividing the product by three. In other words,
- d* $55 - 40 \times 2/3 = 10$. Now, for the multiplicand, I consider a sum of RM200 per month to be adequate. The total sum amounts exactly to RM24,000 that is $200 \times 10 \times 12 = 24,000$. I would round this off at RM23,000 taking into account the various vicissitudes.
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- As for the award for the loss of dependency, I consider the multiplicand selected by the Sessions Court to be unrealistic having regard to the evidence on record. I think that a sum of RM400 per month is reasonable in all the circumstances of the case. The multiplier is as prescribed by the fourth proviso to s. 7(3) of the Act.
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- The award of the Sessions Court refusing an award for loss of services is accordingly set aside. I would award RM23,000 under that head of damages. As for the multiplicand applied by the Sessions Court, I would set it aside and substitute in its place a multiplicand of RM400. The multiplier is as specified by the Act.
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- One word about the product. It is to be remembered that all products on the statutory formula prescribed by the Act are upon a direct multiplication and not by reference to actuarial tables.
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The upshot is that the appeal is allowed to the extent hereinbefore indicated. The orders of the Sessions Court and the High Court are set aside and substituted with the orders herein made. All other consequential relief granted by the Sessions Court stands. The plaintiff will have his costs at all levels. The deposit paid into court will be paid out to the plaintiff.

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